No. 1586

United States Circuit Court of Appeals

FOR THE NINTH DISTRICT

THE WILLIAMSBURGH CITY FIRE INSURANCE COMPANY (a Corporation),

Plaintiff in Error,

vs.

LEON WILLARD (Doing Business Under the Firm Name of Leon Willard & Company),

Defendant in Error.

REPLY OF PLAINTIFF IN ERROR TO BRIEFS ON BEHALF OF DEFENDANT IN ERROR

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Reply of Plaintiff in Error to Briefs on Behalf of Defendant in Error.

I.

The proposition first presented in the respondent's brief, and that which underlies his entire argument is that the exemption clause in the policy upon which the action is brought does not relate to loss by fire, but relates solely to loss by earthquake, i. e., loss caused by the vibratory action of the earthquake. This contention, however, is not only opposed to the express language of the policy, but

is inconsistent with a proper construction of the terms of the exemption clause, and contrary to the judicial interpretation that such terms have received.

No authority is presented in his brief in support of his contention, and those to which he refers under this point of his argument sustain the position of the appellant. In fact, the authorities are uniform wherever the point has been presented that the loss which is referred to in the exemption clause of the policy is the same kind of loss as that against which the contract of insurance is made.

The proposition that the exemption clause "distinguishes" and "excludes" loss or damage by earthquake from loss or damage by fire ensuing upon an earthquake is not only in disregard of the purpose for which the parties entered into the contract of insurance and the form in which they have expressed the terms of this contract, but is also at variance with every judicial construction that has been given to policies in this form.

By the contract the defendant insured the plaintiff "against all direct loss or damage by fire, *except as hereinafter provided,*" upon the property therein named, and (after enumerating certain acts of the plaintiff which would avoid the policy) the instrument declares in express terms that the defendant "shall not be liable for loss or damage occasioned by or through any earthquake," and thus expressly excepts from the contract of insurance any loss or damage that the property might sustain by reason of any earthquake. In *Yoch* vs. *Home Mutual Ins.*

Co., 111 Cal. 503, the Supreme Court of this State, in construing these words in a policy, held that they were to be regarded as a limitation upon the causes of fire against which the insurance was made.

One of the grounds upon which respondent relies, in support of his contention, is that policies issued by other insurers contain provisions that, in his opinion, would sustain his construction, but it is hardly necessary to say that the policy in question is to be measured by its own terms. Neither can his position be sustained by either of his many conjectures of the reason why the clause was inserted in the policy. The suggestion on page 9 of his brief that it is equivalent to a clause inserted for the purpose of avoiding liability for the effect of a volcanic eruption, is original, even though it be a conjecture.

The effect of the clause is to be determined by its own terms, construed in connection with other portions of the policy to which it relates. By its own terms it is not limited to "loss or damage by earthquake," but includes all "loss or damage occasioned by or through earthquake"—a phrase comprehensive enough to include a loss by fire if the fire was itself caused by an earthquake; and, as the insurance is against fire only, the fact that the phrase is comprehensive enough to also include damage by earthquake where fire did not ensue, not only does not diminish its effect when applied to such loss by fire, but destroys its force as an argu-

ment for holding that it might be applied to a mere earthquake damage.

Whenever the question has been presented for judicial construction it has been invariably held that the "loss" referred to in the exemption clause is the "loss" for which the insurance was made. It was so held by Judge Seawell and Judge Murasky, in the Superior Court in this city, and by Judge Whitson, by Judge Van Fleet and by Judge Farrington, in the Circuit Court for this District.

In *St. John* vs. *American Ins. Co.,* 11 N. Y., 516, the Court after stating that the sole peril insured against was "loss or damage by fire," said: "When, therefore, this policy proceeds to declare that the defendants will not be liable for any loss occasioned by the explosion of a steam boiler, it refers *prima facie* to such a loss as by the prior provisions of the contract the defendants would be bound to indemnify;" and to the argument that the words "by fire" should be interpolated after the word "loss" in the exemption clause, the Court said: "When we see that the comprehensive words *any loss* are used in the place of "any loss or damage by fire" we cannot, upon any authorized rules of interpretation, hold that a restricted meaning is intended." The same principle is declared and applied in *United Life Ins. Co.* vs. *Foote,* 22 Ohio St., 340; *Imperial Ins. Co.* vs. *Express Co.,* 95 U. S., 227; *Stanley* vs. *Western Ins. Co.,* Law Rep., 3 Exch. Ca., 71; *Holmes* vs. *Phoenix Ins. Co.,* 98 Fed.,

240; *Montgomery* vs. *Fire Ins. Co.,* 55 Ky., 427; *Yoch* vs. *Home Ins. Co.,* 111 Cal., 503.

In an action by Baker, et al., against this appellant upon a policy containing the same exemption clause, Judge Whitson said (157 Fed. 260):

"The policy cannot be distorted into any other "than a fire insurance contract without departing "from well-known rules of construction. It would "have been idle to except losses for which, by the "terms of the policy, defendant would not have "been liable in any event. If no reference had been "made to earthquake as an excepted hazard there "could have been no liability for loss so occasioned "unless fire ensued, and then for the loss by fire and "not by earthquake. To hold with plaintiff's con- "tention would be to conclude that the defendant "had engrafted an exception from liability for "which it was not liable in the first instance. From "that viewpoint the exception would be meaning- "less. While the rule is familiar that a construction "most favorable to the insured will be adopted, it "will not justify hunting for excuses to annul a con- "tract to the prejudice of an insurer."

In *Mich. F. & M. Ins. Co.* vs. *Whitelaw,* 1 Ohio, C. C. (N. S.), 412, cited by respondent, the company insured against "all direct loss and damage by fire," but provided that it should not be liable "for loss caused directly or indirectly by riot, etc." The insured building was destroyed by fire communicated to it from another building which had been set on fire by rioters. The plaintiff contended that because the words "by fire" were omitted in this

portion of the exemption clause the company was exempted only from loss caused by riot and not from loss by fire; that loss by fire was not intended to be excepted, otherwise the policy would have specified that the company shall not be liable for loss by fire caused by riot. The Court, however, held otherwise, saying: "Certainly the language employed is sufficient to indicate and include all loss caused by riot. If we are to employ the ordinary rules of interpretation to this contract the insertion of the words 'by fire' would be wholly superfluous. The indemnity is only against loss by fire. The two together read: 'Does insure against all direct loss or damage by fire, except loss caused directly or indirectly by riot, etc.' The exception limits the risk which was otherwise assumed,—an exception from a fire loss. Insurance against loss by fire, except loss caused by riot, surely means but one thing, and that is that the company does not assume loss of any kind caused by riot." This case was afterward affirmed by the Supreme Court of Ohio, 73 Ohio St., 365.

Luckett-Wake Tobacco Co. vs. *Phoenix Ins. Co.*, was a case recently decided by the Logan Circuit Court of Kentucky in an action upon a policy of insurance against fire "except as hereinafter provided," upon certain tobacco of the plaintiff in its warehouse. The policy provided that "This company shall not be liable for loss caused directly or indirectly by riot, etc." In January of the present year a body of "night riders" riotously set on fire

and destroyed the warehouse and the tobacco therein. In an action upon the policy to recover for this loss the plaintiff contended that it was not within the exemption claim; that if loss *by fire* had been intended to be exempted the policy would have specified its exemption from "loss by fire caused by riot"; that the "loss caused by riot" named in the clause meant loss by way of breakage and like injury. The Court refused to accept this construction of the policy, saying: "The causualty insured "against is fire, but it is plain that the defendant did "not agree to insure the plaintiff's tobacco against "*all* fires, for the leading clause in the policy insures "the plaintiff against all loss or damage to its stock "of leaf tobacco by fire *'except as hereinafter pro-* "*vided.'* The phrase 'except as hereinafter pro- "vided,' must be given some meaning. Beyond all "doubt some fires were not intended to be insured "against and these it is plain were to be later de- "scribed in the policy. . . To decide that the pur- "pose of the parties in introducing the exception "quoted was merely to provide that the company "should not be liable for breakage and like injury "caused by a riot is to hold the clause in question to "be useless surplusage. This clause has no effect and "accomplishes no purpose whatever as a part of the "contract if it is so construed. The interpretation "contended for makes it a nullity. To give any clause "in a written contract an interpretation which "makes it accomplish no purpose in the structure "of the instrument is in effect to disregard such

"clause altogether. Such a construction clearly "violates the rule which requires that effect be given "to all parts of the writing and to every word of it "if possible. . . . It is quite impossible to believe "that the parties in the present case inserted a pro- "vision exempting the company from liability for "breakage or other like injury caused by riot out "of fear that anyone might contend that this was "a loss by fire. It is not likely to say the least of it "that the parties had any such improbable thought "in mind in the preparation of the policy sued upon. "Such interpretation is not only unreasonable but "it makes such clause entirely meaningless as a part "of the contract between the parties. The Court "would be quite as much justified in striking it en- "tirely out of the contract as it would in putting an "interpretation on it which would make it use- "less."*

We have quoted the latter portion of the opinion as an effective answer to similar contentions on behalf of the respondent herein.

In support of his contention that the "loss" named in the exemption clause is not the "direct loss or damage by fire" against which the policy is issued, but is to be construed as such loss or damage, other than from fire, which may be "occasioned by or through earthquake," he cites three cases, viz., *Commercial Ins. Co.* vs. *Robinson,* 64 Ill. 265; *Insurance Co.* vs. *Parker,* 23 Ohio St. 85; and *Heffron* vs.

* Copies of this opinion will be given counsel for the respondent and the clerk of the court for delivery to the Judges in connection with this brief.

Kittanning Ins. Co., 132 Penn. St., 580, 20 Atl., 698. But in none of these cases was this question presented by the facts or decided by the Court. In the Robinson case the policy provided that the insurer should not be liable (a) "for any loss or damage *by fire* caused by means of invasion, etc." nor (b) "for any loss caused by the explosion of gunpowder or explosion of any kind." The loss for which the action was brought was from a fire which had been caused by an explosion, and the Court, after stating that the question to be determined was whether the last of the above clauses included a loss by fire resulting from a fire-caused explosion, or applied only to damage by concussion, held that the omission from the latter clause of the words "by fire," which were included in the first, created an ambiguity or doubt which should be resolved against the insurer, and for that reason the loss was not within the exemption. This decision is, however, not in accord with decisions in other States upon similar facts.

In the Heffron case the policy provided that the insurer should not be liable (a) "for loss in case of fire happening by any insurrection, etc. . . ." (b) "nor explosions of any kind whatever within the premises, nor by concussions merely." The loss sustained was from a fire which occurred by the explosion of a lamp, and the question was whether this was within the exception named in the policy; the Court said: "The whole clause is divided into different sections, each covering excepted risks of

different character; they are all sufficiently defined except the second, which is made ambiguous by the absence of any governing words before the word explosion"; and referring to certain words proposed to be supplied, said that if either of those proposed was equally sustained by the context, that must be taken which is the most favorable to the assured; and held that the omission should be supplied by inserting before "explosions" the word "by," so that in connection with the introductory words of the exemption the exception should be restricted to losses arising from explosions rather than extended to the broader ground of loss by fire originating from explosions.

In the Parker case the policy provided that the company should not be liable for damages occasioned by the explosion of a steam boiler, nor for damage resulting from *such* explosion, nor explosions caused by gunpowder, gas or other explosive substance. The loss sustained was from fire resulting from an explosion of gas, and the Court held that the Company was liable therefor upon the ground that the exemption from damages resulting from explosions was by the terms of the policy expressly limited to those resulting from the explosion of a steam boiler and did not extend to damage resulting from an explosion caused by gas. At the same term at which the Parker case was decided the same Court rendered its decision in the Foote case, (22 Ohio St. 340), elsewhere herein cited, in which it held that inasmuch as the policy was against loss

by fire the exemption must be construed as also referring to a loss by fire.

In its opinion in the Parker case, the Court distinguishes that case from the Foote case by the fact that in the Foote case the exemption clause was from damage "occasioned by or resulting from any explosion," without any limitation, while in the Parker case the exemption clause being from damage "occasioned by the explosion of a steam boiler and from damages resulting from *such* explosion," did not include damages from an explosion caused by gas.

It thus appears that in two of the cases relied upon by the respondent the Court held the insurer liable by reason of the ambiguity in the exemption clause which the policy had itself created by the terms employed therein, and in the other case that the insurer had not attempted to provide an exemption from loss by fire which resulted from the explosion of gas.

There is, however, no ambiguity or uncertainty whatever in the terms used in the exemption clause of the policy herein,—there is no ellipsis or omission of any word or phrase necessary to complete the sense of either of the classes of enumerated perils—The provision in question is distinct and unqualified that the defendant "shall not be liable for loss or damage occasioned by or through any earthquake."

As was said in the Heffron case, "The whole clause is divided into different sections, each cover-

ing excepted risks of different character," and they are all sufficiently defined.

II.

Respondent next contends that the defendant has made a distinction in its policy between losses caused by "invasion, etc," and losses caused by "earthquake, etc;" that as it has exempted itself from liability for "loss caused directly or indirectly" by the former and only "for loss or damage occasioned by or through" the latter the policy must be construed as rendering it liable only for such loss by fire as is "directly" caused by earthquake; that by this change of phraseology in its exemption clause it has limited its exemption to such loss as results from a fire originating upon the premises where the insured property was located.

This conclusion does not follow unless the terms used in the latter clause have a more restricted meaning than those used in the other clause. If they have the same significance either by themselves or when used in connection with other words, they are entitled to receive the same construction. The rule is familiar that the words of a contract are to receive their ordinary meaning, and are to be construed in such a manner, if possible, as will uphold rather than defeat the contract. We know of no rule of construction—respondent has not cited any—that would justify a Court in holding that because different words or phrases which have the same meaning are used in a contract, one of them

must be construed with a more limited meaning than the other, or than it would have if it were used alone.

In the opening brief herein we have called the attention of the Court to the meaning of the word "occasioned," as defined by lexicographers and as construed by Courts, and we submit that it appears therefrom that the idea of "indirectness" is implied by the mere use of the word "occasioned." If, as shown in those authorities, "to occasion" means "to cause indirectly," it would have been a gross misuse of language to express in the policy that the defendant should not be liable for loss or damage "occasioned *indirectly*" by earthquake. The full meaning of this phrase is implied in "occasioned," and there was no need that it should be expressed.

"What is implied in a contract is as much a part of it as if expressed."

Holmes vs. *Phoenix Ins. Co.,* 98 Fed. 240.

"There is no substantial difference between a clause in which the limitation is implied by legal rules of construction and a clause in which the limitation appears in express language."

Washington C. Co. vs. *William Johnston Co.,* 125 Fed. 273.

That "occasioned" as used in the policy is not intended to have the same limitation of meaning as "caused directly" appears from its use in a subse-

quent exemption clause therein in which it is declared that the defendant "shall not be liable . . . for loss occasioned by ordinance or law regulating the construction or repair of buildings." The loss by a fire in such a case may be the inability, by reason of the provision of the ordinance, to restore the building to the condition it had before the fire, thus involving the entire value of the building, and may be greater than the amount of the insurance. The building may have been a wooden building within the limits of the fire ordinance, and the fire may have damaged it to such an extent that under the ordinance the owner would not be permitted to restore or repair it, but would be required to construct it with brick. The cost of repairing it would be small, compared with the cost of a new building of brick, but by reason of the ordinance the actual damage would be much greater and would be within the protection of the policy, but for this exemption clause. From its very nature such loss is not "caused directly" by the ordinance.

Hewins vs. *London Assurance Co.*, 68 N. E. 62.

We also refer to the following cases, which illustrate the meaning of "occasioned" in contrast with "caused."

Penn. Co. vs. *Congdon*, 33 N. E. Rep., 759.
Meysenberg vs. *Schliefer*, 48 Mo., 420.
Curry vs. *Chicago & N. W. R. R. Co.*, 43 Wis., 655.

The accompanying idea of "indirectness" is still further conveyed to the mind by the word "through" as used in the phrase. The exemption extends to all loss or damage "occasioned by or *through* earthquake," and this word must also receive its fair construction. It is a prominent word in the clause and entitled to full consideration in ascertaining the meaning of the phrase. "By" has reference to direct, and "through" to indirect action. "Through"' is defined by lexicographers to mean "by means of," "on account of," "in consequence of," and is used to explain indirect action, while "by" is used to express "direct" action.

When words or phrases of similar import are used in an instrument in connection with different subject matter the respective intention with which they are so used is to be ascertained by considering their significance in relation to the subject matter in connection with which they are used. It is very clear that the paragraph in the policy in which the phrases "caused directly or indirectly" and "occasioned by or through" are found was placed there for the purpose of enumerating certain perils to which the contract of insurance should not apply. These perils, so far as they concern the questions herein involved, are classified as follows: viz., 1st: "invasion, insurrection, riot, civil war or commotion, military or usurped power, order of any civil authority." 2nd: "Volcano, earthquake, or hurricane, or other eruption, convulsion or disturbance."

For the purpose of ascertaining the meaning of either of the words or phrases respectively used with these classes of perils, the nature of the perils in each class must also be considered.

Those in the first class are abnormal conditions of government or society brought about by human agency or design to which their existence may be traced, and any loss resulting therefrom is properly said to be "caused" by those conditions. Those in the other class are automatic or self-acting manifestations of forces of nature, for whose existence or mode of operation no cause or law can be assigned, and any loss sustained thereby is properly said to be "occasioned" by or through those manifestations.

No ambiguity or doubt is created by this classification of the exempted perils, or by placing the several classes in different clauses, or by the use of the phrase "caused directly or indirectly" with one class and the phrase "occasioned by or through" with the other class. Such classification is reasonable and is in accordance with the character of the perils, and the phrase employed with each class to denote the source of any action by the perils named therein is appropriate to the perils of that class.

The words of Judge Sanborn in the case of *Delaware Insurance Co.,* vs. *Greer,* 120 Fed. 916, approved by this Court in *Kentucky Vermillion Co.* vs. *Norwich Union Insurance Co.,* 146 Federal, 695, are appropriate for consideration in the construction to be given to the policy herein, viz.:

"Contracts of insurance, however, are not made by or for casuists or sophists, and the obvious meaning of their plain terms is not to be discarded for some curious, hidden sense, which nothing but the exigency of a hard case and the ingenuity of an acute mind would discover."

The contract of insurance herein was made by the parties with reference to such usual and ordinary risks from fire as might be anticipated from human experience in ordinary times; and for the purpose and with the intention of limiting the contract to such risks, they have enumerated in the exemption clause of the policy certain sources of fire which are extraordinary in their nature and not within the ordinary experience of mankind. If this intention has been fairly expressed in the policy it should be so construed and the effect of the policy so limited.

In the first of the classes so enumerated they have named those sources of fire which might arise during the subversion of social order and while they are without the protection of law or capable of protecting the insured property. The sources which they have named in the other class are those which transcend all means of prevention or even of anticipation. Each of the sources thus exempted is of an extraordinary nature and of a character which could not be anticipated, and against which no provision of indemnity could be intelligently made.

The provision for each class is distinct and unqualified, and, complete in itself, and is to be construed by its own terms. The provision that the defendant "shall not be liable for loss or damage occasioned by or through an earthquake" includes all loss of every kind and is not connected with or related to the previous clause either by express reference or by implication, and its construction is not dependent upon or to be affected by the construction to be given to the words in that clause. Such construction would be to interpolate into the clause words which the parties have not placed there, and, make the contract different from what they have made it. As an exception to the risk assumed by the insurer it limits the extent of its liability, and its terms are to receive as broad a construction as the terms by which the liability was assumed; and those terms being universal they take out of the contract of the insurer all liability for any loss or damage by fire of which the earthquake was the proximate cause, whether such loss results from the immediate action of the fire in consuming the insured property or, though consequent upon the fire, but not consumed or even touched by it, is attributable to its action and is the result thereof, as in the Russell case cited by Mr. Bowie, and as shown also in the cases cited in Subdivision III of this Brief. Its effect upon the contract is to make the policy read as if the defendant had insured the plaintiff against all direct loss or damage by fire except such as should be occasioned by or through earthquake.

Any reasonably intelligent and fair-minded man upon reading the exemption clause in connection with the prior portion of the policy could come to no other conclusion than that the object as well as the terms of the contract was an indemnity against loss by fire, and that as the parties had agreed that the liability of the defendant should not include any loss that might be caused by earthquake, such agreement could not include loss from a fire which should be caused by an earthquake. The plaintiff, however, upon reading the policy, could have no doubt upon this point. Being informed by the phrase "except as hereinafter provided," immediately following the insuring clause, that there were exceptions to the contract, he would look for the excepting clause and upon reading it would there learn that any loss resulting from earthquake was not covered by the policy. He knew that he had contracted for immunity only against fire, and that the premium which he had paid did not cover any loss other than from fire, and he would know that the exemption clause had reference only to loss by fire. He would know, too, that he had not negotiated with the defendant for insurance against any damage that his property might sustain from the vibratory effect of an earthquake, and the only conclusion which, as an intelligent and upright man, he could draw from the clause would be that the loss therein referred to and which is thereby excepted from the policy is such loss as would come from a fire which might be caused by an earthquake.

We make the suggestion that the inability of the "skilled lawyers" referred to in the brief to understand from the terms of the policy that it was intended to exclude such losses as the one here involved may have been very greatly aided, by the payment or expectation of a fee for endeavoring to secure such a judicial construction of its terms.

Giving, therefore, to the words used in the above phrases their ordinary import, and giving also due consideration to the character of the perils which are enumerated in the respective classes, and to the presumed purpose with which the contract was made, it should be held that the phrase "occasioned by or through," as used in reference to the latter class, is at least fully as comprehensive as the phrase "caused directly or indirectly," used in reference to the other class and must include all loss or damage by fire that was brought about directly or indirectly by reason of or in consequence of the earthquake. Judge Van Fleet so stated in making his ruling upon the plaintiff's motion.

If the phrases are of the same or equivalent significance the contention of the respondent, as well as the statement in the opinion of Judge Whitson, in the Baker case, (157 Fed., 260) that the policy was framed in view of a *"different liability,"* as applied to insurrection, etc., than as applied to earthquake, cannot be sustained; and while it is not necessary to hold that "it was intended by the use of the words 'occasioned by or through' to *enlarge upon* the words 'directly or indirectly,' there is no ground for

holding that it was intended by the use of those words to change the extent of the defendant's liability or to reduce or *diminish* its exemption from liability."

On the contrary we submit as a matter of common observation that in the usage of speakers, writers and persons engaged in the preparation of contracts or other written instruments who may employ synonymous words or phrases by way of definition or expression of purpose or object, it is with the intention that the synonym employed shall emphasize or add strength to the word or phrase previously used rather than that its effect shall be diminished thereby.

If by the words "occasioned by or through" "as broad a statement of exemption was made as could be by the use of any comprehensive term which should omit specific details," e. g., "caused directly or indirectly," Judge Whitson's conclusion that "this exception relates to the origin of the fire," i. e. the place of its origin, ceases to have any support, and the contention of the respondent, at page 20 et seq. of his brief, as well as the ruling of the Circuit Court at the trial herein, that "the exemption as to earthquake has relation only to fires originating upon the premises where the insured property is located" becomes untenable. We call attention to the fact that both Judge Whitson and Judge Van Fleet state that the soundness of their views "is not free from doubt."

That this construction is the basis of Judge Whitson's conclusion appears by his statement in the latter part of his opinion that "the ground upon which I expressly place my decision is that the policy has by its own limitation fixed a more extended liability than is now contended for, and this is to be drawn from the context, classification of hazards and the phraseology by which they have been excepted." We respectfully submit that the sources from which he states that his construction of the policy has been drawn require a contrary construction of the exemption clause of the policy.

If it be assumed as contended on behalf of respondent that "caused" and "occasioned" are synonyms, and are used in the policy as "equivalents," or without any distinction in meaning, and that "occasioned" in the earthquake clause is used as meaning "caused," upon what ground is it to be held that it is not used as meaning "caused directly or indirectly," or that it is used as meaning "caused "directly" rather than "caused indirectly?" The words "directly or indirectly," which are joined with "caused" in the invasion clause, add something to the meaning of the word and give it a broader scope than it would have standing alone, just as the words "by or through" give a broader scope to the meaning of the word "occasioned" than that word would have if standing by itself. The phrase "caused directly" has a more limited meaning than the phrase "caused directly or indirectly"; and if it is to be assumed that "occasioned" in the

earthquake clause is used with the same meaning that "caused" has in the invasion clause, it must also be assumed that it is used with the enlarged meaning that the words "directly or indirectly" give to the word in that clause. But assuming that "caused" standing alone is to be construed as "caused directly" there is no authority for substituting the phrase "caused directly by earthquake" for "occasioned by *or through* earthquake." The idea of indirect action that is conveyed by the word "occasioned" and also by the word "through" which the parties have incorporated into their agreement is not to be brushed aside by substituting for those words a phrase which does not carry with it that idea. To make such substitution would be to make a contract for the parties which they have not themselves made or agreed to make rather than to construe the one which they have made. By their agreement they have exempted the insurer from liability for any loss by fire indirectly resulting from earthquake as fully as that which directly results therefrom.

The distinction between the two clauses made in the brief of Mr. Brandenstein, viz: that the perils enumerated in the first clause are causes of fire and not caused by fire, while those enumerated in the second clause are incapable of causing fire but are themselves caused by fire, and for that reason the clause exempting the insurer from liability for loss resulting from these perils must be limited to damage otherwise than from fire, is not founded in fact,

and is moreover in disregard of the facts claimed by appellant to exist in the present case and upon which the Circuit Court directed a verdict against it.

It is conceded in the brief of Mr. Redman, (p. 20) that fire may be caused by earthquake, and in his opinion in the Baker case Judge Whitson points out several modes in which an earthquake might cause a fire, and the books abound with cases—chiefly arising in the Northwestern States—in which actions have been maintained upon policies of insurance where the loss from fire has been caused by hurricane. To assume, therefore, that earthquake or either of the perils enumerated in this clause is itself caused by fire, is to make conjecture rather than fact the premise from which to draw the conclusion that the parties intended to exclude from the liability of the insurer only such damage other than from fire as would be consequent upon the earthquake, and then to further conjecture that the parties had this conjecture in their minds when they entered into the contract of insurance.

If science is unable to determine the properties of matter, or the cause to which any action of the forces of nature is to be ascribed, it is mere conjecture to assume as a fact the existence of any particular property or to ascribe any particular cause to the manifestation of any force of nature. And in the absence of evidence on the subject the judicial knowledge of the Court will not enable it to determine that any particular opinion on that subject

was in the mind of either of the parties to the policy.

The exemption clause does not by its terms limit its operation to particular manifestation of earthquake as an agency in causing a fire-loss; it is unqualified and includes any kind of fire-loss occasioned by an earthquake for which the insurer could be held liable in the absence of an exception of that peril. If we concede, for the sake of argument, the fanciful and necessity-begotten suggestion that earthquake can cause a fire-loss other than by itself causing fire, nevertheless the kind of loss being unqualified, the insurer is exempted from liability for any and all kinds of fire-loss that may be caused by the peril of earthquake. The adjudicated cases involving the construction of an unqualified exception from loss by explosion absolutely sustain the soundness of this conclusion. Under a fire insurance policy the insurer is liable for two kinds of fire-loss which may be caused by the peril of explosion, i. e., damage by concussion resulting from a fire-caused explosion, and damage resulting from fire which is itself caused by explosion. In a number of cases, where the policy contained a provision exempting the insurer unqualifiedly from liability for loss by explosion, the insured contended that as the insurer, in the absence of an exemption from loss by explosion would have been held liable for both kinds of fire-loss, that by concussion and that by fire itself caused by explosion, therefore the operation of the exemption should be limited to the damage by con-

cussion, thereby extending the indemnity under the policy in favor of the insured; but the Courts have uniformly, in every case ever reported where this argument was made, condemned such a contention as being unsound and opposed to the plain words of the contract, and have held that under such an exemption the insurer is exonerated from liability for every kind of fire loss which could be caused by the excepted peril.

Imperial Ins. Co. vs. *Express Co.,* 95 U. S. 227.

United Life Ins. Co. vs. *Foote,* 22 Ohio St. 340.

Stanley vs. *Western Ins. Co.,* Law. Rep. 3 Exch. Ca. 71.

Montgomery vs. *Fire Ins. Co.,* 55 Ky. 427.

Roe vs. *Ins. Co.,* 17 Mo. 301.

McAllister vs. *Ins. Co.,* 17 Mo. 306.

Strong vs. *Sun Mutual Ins. Co.,* 31 N. Y. 103.

St. John vs. *American M. & F. Co.,* 11 N. Y. 516.

Miller vs. *Ins. Co.,* 76 Cal. 145.

The same doctrine is impliedly accepted by the Courts in the Heffron, Robinson and Parker cases, *supra,* for in all of those cases, if the Courts had not considered that an exemption from loss by explosion without qualification exempted the insurer from both kinds of fire-loss which could be caused by an explosion, they would not have had to base the conclusion reached in those cases upon the fact that ambiguities were contained in the exemption clause.

If any other answer could possibly be necessary to the argument of counsel based upon the erroneous premise that an earthquake can cause a fire-loss other than by itself causing fire, it is found in that part of the exemption clause in the policy in suit relating to the peril of explosion. We have seen that explosion may cause a fire-loss in two ways, and the insurer here has by the policy expressly excluded loss occasioned by concussion resulting from a fire-caused explosion, but has expressly assumed liability for loss occasioned by fire which is itself caused by explosion; therefore, even if we adopt the fanciful suggestion by counsel that an earthquake can cause a fire-loss other than by itself causing a fire (which suggestion is utterly unfounded in fact) nevertheless, having expressly assumed liability for damage by explosion-caused fire, while excluding liability for damage by concussion, and having omitted this qualification as to the character of fire-loss excluded with relation to the excepted peril earthquake, it must necessarily follow that the intent of the parties to the contract must have been to exclude from the liability of the insurer damage by earthquake-caused fire, as well as any other kind of fire-loss that the ingenuity and sophistry of counsel may lead them to argue an earthquake may cause.

III.

While we contend that the exemption clause includes fire losses indirectly caused by earthquake, we

also maintain that if the fire was started by earthquake, and without any intervening cause spread to and destroyed the plaintiff's property, the earthquake was the "proximate" cause of the loss as well as of the fire, and was a peril within the exemption clause of the policy; and that the loss by fire was "directly" caused by the earthquake; that although fire was the "immediate" cause of the loss it was only the means or instrumentality by which the proximate cause produced the loss. The proximate cause of a loss is not that which is nearest in time or in position, but that cause but for which the loss would not have occurred.

"The question is not what cause was nearest in time or place to the catastrophe. That is not the meaning of the maxim *"causa proxima non remota spectatur."* The proximate cause is the efficient cause, the one that sets the other cause in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result."

Aetna Ins. Co. vs. *Boon,* 95 U. S. 117.

"When it is said that the cause to be sought is the direct and proximate cause, it is not meant that the cause or agency which is nearest in time or place to the result is necessarily to be chosen. The active, efficient cause that sets in motion a train of events which brings about a result without the intervention of any force started and working actively from a

new and independent source is the direct and proximate cause referred to in the cases."

Lynn G. & E. Co. vs. *Meriden Fire Ins. Co.,* 158 Mass. 570; 33 N. E. Rep. 690.

"The inquiry must always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury."

Milwaukee & St. P. R. R. Co. vs. *Kellogg,* 94 U. S. 469.

"Direct" may or may not be equivalent to "proximate." Its meaning in any particular connection is to be determined by the purpose with which it is there used. Philology is not always the correct test for ascertaining the meaning of a word. The same word may have widely different meanings, according to its connection with other words or the purpose for which it is used. A horse is properly said to be "fast" as well in reference to its speed as when it is securely hitched to a post. In the one case the word is an adjective of quality, in the other of situation or condition. The word "direct" is neither antithetic nor correlative to the word "proximate," and the two may be used in the same sentence with either like or different meanings. Its meaning in any particular use is to be determined by the context. In *People* vs. *Boylan,* 25 Fed. 594, cited by respondent, the words "direct payment" were to be construed, and the Court said "The word 'direct' is of large use in the language and has been

adopted into the law in many relations. We have direct descent, direct taxes, direct interest, direct route, and now direct payment [and we may add here, direct loss]. Any effort to assimilate its meaning in all the places and connections in which it may be placed must fail for obvious reasons." The "direct" loss or damage by fire which is specified in the insuring clause of the policy may refer to the *manner* in which the loss is produced by fire, or to the *cause* of the fire by which the loss is produced, but the exemption clause of the policy refers solely to causes by which the fire may be produced.

Neither is the meaning of "direct" determined by that appropriate to the use of the word in the lightning clause. On the contrary, the fact that lightning is singled out from all the exempted causes as the one for which direct, i. e., "immediate," damage other than from fire may be assumed by specific agreement, indicates that the term elsewhere in the policy is used with a different meaning. Moreover, the "direct damage" referred to in the lightning clause refers to the character of the damage, whereas the clause referring to the loss which may be occasioned by earthquake refers to the cause and not the character of the loss.

The direct loss or damage insured against must be produced by fire, but the insured property need not be consumed or even reached by the fire.

In *Ermentrout* vs. *Girard, Etc., Ins Co.,* 63 Minn. 305, 65 N. W. 635, the policy insured the plaintiff

against "all direct loss or damage by fire," to a certain warehouse. A fire upon an adjoining building weakened its wall so that it fell upon the insured property. The fire itself did not touch the insured property. The counsel for the insurance company contended that by reason of the word "direct" in the insuring clause the loss was not covered, as the insured premises were not touched by the fire. In answer thereto the Court said: "The word 'direct' in the policy means merely 'immediate' or 'proximate' as distinguished from remote, and held that as the fire was the efficient and proximate cause of the loss the company was liable.

In *Insurance Company* vs. *Leader,* 48 S. E. Rep. 972 (Ga.), a stock of merchandise was insured under a similar policy. By reason of a fire in close proximity to the premises where the insured goods were located, the goods were placed in such imminent danger that in order to prevent their probable destruction the assured removed them to a place of safety, but in removing them they sustained certain damage, and for this damage action was brought upon the policy. The Court decided that the loss was covered by the policy, saying "Direct as here used means no more and no less than 'proximate' or 'immediate.' We agree with Elliott (Elliott on Ins., Sec. 221), where he says: *'direct loss or damage by fire* means loss or damage occurring directly from fire as the destroying agency in contradistinction to the *remoteness* of fire as such agency.' The word 'direct' means merely the im-

mediate or proximate as distinguished from the *remote cause.*"

The same principle is declared in *Cal. Ins. Co.* vs. *Union Compress Co.,* 133 U. S. 387, where the Court said that "those words" (i. e., direct loss by fire) "mean loss or damage occurring directly from fire as the destroying agency in contradistinction to the *remoteness* of fire as such agency.".

In *N. Y., etc., Express Co.* vs. *Traders Ins. Co.,* 132 Mass 377, a steamboat, on which were goods insured against fire but not against collision, came into collision with another steamboat. A fire caused by the collision broke out, which drove from their posts those whose duty it was to run the steamboat, and thus prevented any use of the means at hand for closing the hole in the side of the boat. The steamboat sank before the fire had reached the insured goods. The Court held that as the intervention of fire prevented the use of the appliances for avoiding the effect of the collision the fire was the proximate and immediate cause of the loss.

The meaning of the word "direct" was not presented or decided in the Hustace case, (175 N. Y. 292,) but that in the opinion of the Court the word "direct," as used in the policy, had the meaning of "proximate," is shown by the following quotation from the opinion: "So while it may be that but for the explosion clause we should be constrained to follow those earlier decisions to which reference was made generally in the Briggs case, and hold defendant liable because the fire in another building

was the cause of the explosion, we are not permitted to do that in view of the exemption clause relieving the defendant from liability from explosion of any kind." If the Court had intended to hold that by reason of the word "direct" in the phrase "loss or damage by fire direct," fire must be the actual destroying agency by burning the property insured and not merely the proximate cause of the loss, under such construction the insurer would never be liable for damage by concussion resulting from a fire-caused explosion, even though explosion was not named in the exempting clause.

"Proximate" is a word employed in insurance language to qualify the cause of the loss and not the loss itself, and as so employed it is frequently used in connection with and as the equivalent of "direct." A fire may at the same time be the proximate as well as the direct and immediate cause of the loss, or it may be only the means or intermediate agency set in motion by some dominant and controlling force. In *Lynn* vs. *Meriden Insurance Company,* 158 Mass. 570, the Court said: "The active, efficient cause that sets in motion a train of events which brings about a result without the intervention of any force started and working actively from a new and independent source, is the *direct and proximate* cause referred to in the books. And, in the opinion of Judge Whitson, in the Baker case, he says:

"It seems reasonably clear that it was the intention of the defendant to exempt itself from liability

if an earthquake should be the immediate, *proximate* and *direct* cause of a fire which destroyed the property."

"Proximate cause" is a phrase employed in the law of insurance and also of negligence. It is not, however, the equivalent of "proximate," and although the proximate cause may be at the same the direct or immediate cause, the phrase does not necessarily mean the nearest cause either in point of space or time. The word "proximate" in this phrase is used with a causal significance making the phrase equivalent to the *causa causans* of the schoolmen, and the phrase is uniformly interpreted as the controlling and efficient cause. The cases given at page 28 of respondent's brief—all of them from Wisconsin—were actions arising out of negligence, and the opinions of the Court therein were all directed to the application of the principle that "proximate cause" is not the same as "proximate," and that the word "proximate" in the phrase "proximate cause" is not the same as "nearest."

In *Lynn* vs. *Meriden Insurance Company,* 158 Mass. 570, a fire broke out in a tower remote from that part of the building in which was the machinery. The fire was extinguished without damage to the building, but not until by creating a "short circuit" it had disrupted and damaged the machinery in a part of the building remote from the fire. The Court held that under the finding of the jury that the damage resulted from the effect of the fire, through the agencies in the building, viz.: the atmos-

phere, the metallic machinery, electricity and other things, the damage must be regarded as caused by the *direct* action of the fire.

In the brief filed by Mr. Bowie nearly 20 pages (Corrected brief p. 31-51) are devoted to the proposition that the clause exempting the insurer from "loss or damage occasioned by or through earthquake" is not to be construed as exempting him from liability for any loss by fire caused by earthquake, but is to be limited to such loss as may be caused by an earthquake which succeeds and is consequent upon the fire. This conclusion is reached by first interpolating the words "by fire" in the "invasion" clause (p. 32) and omitting them in the "earthquake" clause thus making the policy in these particulars to correspond to that in the Robinson case (64 Ill. 265). Having thus framed the earthquake clause so that it does not in terms exempt the insurer from any loss "by fire" he proceeds to show that there *may be* an earthquake loss to which the clause will be applicable, and if so, contends that it is only this character of loss from which the insurer is exempted. This conclusion is reached by the following method of reasoning, viz.:

Earthquake and hurricanes "succeeding a fire" *may* cause a fire loss without in any way causing a fire. (This proposition he illustrates by the Russell case, 111 N. W. 400, where the brick wall of a building left standing after the building itself had been burned, fell upon another building several

days after the fire, by reason of a high wind blowing in that direction and the damage thus caused to this building was held to have been caused by the fire.) His next step in the argument is (p 47): As an earthquake "consequent upon a fire" *can be* the immediate cause of a fire loss without in any way causing a fire, and as the word earthquake is "brigaded" with "hurricane" which "we know" refers to a loss consequent upon a fire, a provision in a policy exempting the insurer from liability for loss caused by earthquake does not exempt him from liability for loss by fire where an earthquake caused the fire. A palpable *non sequitur!*

Unless it be admitted that a fire can not be caused by an earthquake or that an earthquake can be the cause of a fire-loss only when it is consequent upon a fire, the above conclusion does not follow: But the very condition presented in the present case, and the postulate upon which the ruling of the Circuit Court was made, is that the earthquake preceded the fire from which the loss was sustained and that the fire was caused by the earthquake.

The interpolation of the words "by fire" into the first part of the exemption clause of the policy is also unauthorized, especially as the only purpose for which this interpolation is sought is to render the clause ambiguous and then by reason of the ambiguity thus created contend that the clause has no effect. See 157 Fed. Rep. 224.

For the same reason, i. e., upon the ground that the contract of insurance is complete and is not to be changed by the insertion of additional terms or conditions under the guise of ascertaining the intention of the parties other than as such intention is to be ascertained from the words which they have used the other interpolations proposed by counsel are unauthorized; and among them is to be included that made by the Circuit Court, viz.: "arising from a fire which originates upon the premises where the loss occurred."

In *Ins. Company* vs. *Express Co.* 95 U. S. 227, a policy against fire was issued upon merchandise in transportation while on board the cars of the Express Company and provided that "no loss is to be paid arising from petroleum or other explosive oils." In consequence of a collision with another train of cars in which was a car of petroleum the latter exploded setting fire to merchandise in other cars of the train. In an action upon the policy the insurer sought to have it construed so as to read "no loss is to be paid arising from petroleum or other explosive oils carried by the parties insured or carried upon the same train of cars used by the parties insured," but the Court refused to make such construction, saying that "such construction would be making a contract instead of interpreting one already made."

The authors of the several briefs are not in accord in regard to the ellipses to be supplied in the

exemption clause. Mr. Redman insists that if the words "by fire" should be added to the word "loss" it would make nonsense of the paragraph. Mr. Bowie, although not urging that they be added, assumes without being authorized thereto, but apparently with a willing compliance, that the defendant desires to have them added and then for the purpose of strengthening his position upon another point urges that when added they shall be qualified by the words "originating upon the premises"—words, for which there is no pretense that the record furnishes any ground for a claim that they are an ellipsis but whose effect would be to materially change the contract which the parties have made.

Mr. Bowie is in error in charging us with arguing that the words "by fire" are to be interpolated into the policy. On the contrary, we have constantly maintained that the policy is complete in itself and that there is no authority or necessity for the interpolation into it of any words whatever. What we have said and what we maintain is that, inasmuch as the policy is a contract for insurance against "direct loss by fire," the use of the term "loss" in the exemption clause refers to the same character of loss respecting which the contract is made; that upon the face of the contract itself the exemption is from the obligation which the insurer has entered into. We are only asking the Court to construe the contract by interpreting its terms in accordance with recognized rules, one of which is that words which are given a particular meaning in a

contract, if subsequently used in the same contract will be presumed to have been used with that meaning. Under this rule no addition to or omission from the words of the policy is either authorized or permitted. The policy remains as it was written by the parties, and is to be interpreted with the sense that the parties themselves have given it. The contract of the defendant was to insure the plaintiff against all "direct loss or damage by fire," and the subsequent use of the words "loss or damage" in the exemption clause is to be interpreted, without the addition or interpolation of any words whatever, as the same loss or damage, concerning which the contract was made, i. e., "direct loss or damage by fire."

IV.

The fact that after the fire had been started it passed through several intervening buildings before reaching the premises where the insured property was destroyed does not change the effect of the exemption clause or render the insurer liable.

This is forcibly shown by the opinion in the Tweed case (7 Wall. 44), where the Court said: "The explosion undoubtedly produced or set in operation the fire which burned plaintiff's cotton. The fact that it was carried to the cotton by first burning another building supplies no new force or power which caused the burning"; and paraphrasing that language we may say "the earthquake produced or set in operation the fire which burned plaintiff's merchandise. The fact that it was car-

ried to the merchandise by first burning other property supplies no new force or power."

Respondent intimates in his brief that the facts upon which the opinion in the Tweed case was given are not correctly set forth in the report; and gives what he terms "a restatement of the facts" as they are given in the Scheffer case (105 U. S. 249), from which it might be inferred from his use of "*at once*" in italics that the fire in the Marshall Warehouse was directly transmitted to the Alabama Warehouse, in which the property was burned. The statement in the Scheffer case that the Alabama Warehouse was burned "by this means" (i. e., by the explosion in the Marshall Warehouse throwing down the walls) "and by sparks from the Eagle Mill, also fired by the explosion," refutes this theory; and the statement of the facts in the subsequent case of "The G. R. Booth" (171 U. S. 450), viz.: "An explosion took place in one warehouse, resulting in a conflagration which spread to a second warehouse, and thence in the course of the wind blowing at that time to a third warehouse containing the insured cotton," confirms the statement in the report of the Tweed case and makes applicable to the present case, the rule there given, viz.: the fact that the fire was carried to the cotton by first burning another building, supplies no new force or power which caused the burning.

In *Washington & G. R. Co.* vs. *Hickey,* 166 U. S. 521, the Court in referring to the Tweed case said:

"In one sense there was in that case a new cause existing in the fact that the explosion caused the fire in another building first, and that the fire was carried by the wind from that building to the building in question and not from the building in which the explosion occurred; and so it was claimed that the fire in the building covered by the policy was not *directly* caused by the explosion; but the Court held that the distinction was not well founded and that within the policy the insurer was not liable," and after thus stating the facts said: "The fire, in other words, occurred by means of the explosion, and no new cause could be said to have intervened simply because the premises insured were burned by the fire communicated from another building."

Whether the fire was started by the earthquake in the building where the plaintiff's merchandise was stored or in an adjoining building, or in a building ten blocks away, is immaterial. It was, as a matter of law, a single and continuous fire from the point where it started until it consumed the plaintiff's property, and there was no new or intervening force or agency which contributed to its origin or existence. The combustible material upon which it fed as it advanced was not a factor in its origin, nor did it contribute a new and intervening cause but it was only a conduit or means

by which it was carried to the insured property. A fire which is started in a building at one side of a city block and is carried across the street to another block is, as a matter of law, one and the same fire, irrespective of the nature of its origin; and any exemption from liability applicable to a policy of insurance upon the building first ignited would be equally applicable to a policy upon the building across the street, and would also be equally applicable if the fire continued through several blocks; or, making use of the language in the Tweed case, "If a hurricane or *earthquake* had first started the fire could it be held [under the exemption clause] that if half the town had been burned over the company would have been liable for all the buildings insured except the one first fired?"

In the Boon case, (95 U. S. 117), after the City Hall had been fired by order of the Commanding Officer, it is stated in the opinion, "without other interference, agency or instrumentality, the fire spread along the line of the street aforesaid to the building next adjacent to the city hall, and from building to building through two intermediate buildings to the store of the plaintiffs, and destroyed the same, together with its contents, including the goods insured by the defendant's policy aforesaid."

In *Hilp Tailoring Co.* vs. *Williamsburgh City Fire Insurance Company,* 157 Fed. Rep. 285, Judge Van Fleet instructed the jury as follows:

"If from the evidence you are satisfied that the earthquake started a fire in some other building in that vicinity than that owned by plaintiff, and that the fire thus started spread to and reached and destroyed plaintiff's building, then and in that case you must find against the plaintiff and in favor of the defendant. A fire thus started in another building, and spreading to and reaching and destroying the plaintiff's building, would be a fire occasioned by or through an earthquake within the meaning of the policy, for loss by reason of which the company cannot be held responsible."

In *Walker* vs. *London and Provincial Insurance Co.,* 22 L. R. Ir. 572, 22 Irish Law Times. ("Reports.") Goods in a house were insured against fire by a policy containing a condition 'that it did not cover any loss or damage *occasioned by,* or in consequence of, incendiarism.' While the policy was subsisting, adjoining premises were set on fire by an incendiary, for whose act the policy-holder was admittedly not responsible; and the fire having spread to the house containing the insured goods, they were destroyed:—The Court held that the word 'incendiarism' in the policy included any act of incendiarism wherever committed which directly caused the loss; that in the absence of evidence pointing to any other cause, the act of the incendiary must be assumed to be the *direct cause* of the loss, and that therefore the insurance company was not liable."

In *Tootal, etc., Co.* vs. *London & L. Ins. Co.,* a policy of insurance against fire had been issued by the defendant upon certain goods of the plaintiff at Kingston, Jamaica, containing the following provision, viz.: "This policy does not cover loss or "damage by fire occasioned by or through earth-"quake." The insured property was destroyed by fire at the time of the earthquake at Kingston, Jamaica, January 14th, 1907. An action brought upon the policy to recover for their loss was tried in the King's Bench Division of the High Court of Justice at London in May of the present year, and at the trial it was shown that the fire spread from the building in which it originated to that in which were the plaintiff's goods and there consumed them. The issue presented to the jury was whether the fire preceded the earthquake or was started by it. In summing up the case before the jury, Justice Bigham gave them the following instruction:

"It is common ground that the fire which destroyed the plaintiff's goods originated in Curphey's place; and it is also common ground that having originated in Curphey's place it spread down to the premises of the plaintiffs and burnt their goods, and I tell you as a matter of law, and you must accept this from me, and act upon it, that if the fire in Curphey's place was what may be called within the terms of this contract, an earthquake fire, and if it spread, as admittedly it did, to Tootal, Broadhurst's premises which were at some distance, without the intervention of any other cause except natural

causes, the defendants are entitled to your verdict. If you find that the fire at Curphey's was set in operation by the earthquake and then spread by natural causes without the intervention of any other cause, that is, spread by the wind or by one thing catching fire from another and so on—that is what I call natural causes—and then spread without the intervention of any other cause to the plaintiffs' goods, then your verdict must be for the defendants."*

In the following cases also a spread-fire was held to be within the provisions of the exemption clause:

Barton vs. *Home Ins. Co.*, 42 Mo. 156.

Kwong Lee Yuen Co. vs. *Manchester Ins. Co.*, 15 Hawaii, 704.

Kwong Lee Yuen Co. vs. *Alliance Ins. Co.*, 16 Hawaii, 674.

In *Mich. F. & N. Ins. Co.* vs. *Whitelaw*, cited by respondent in support of the contrary position, the liability of the insurer for a spread fire was not discussed by the Court, nor did the term "direct" receive any discussion or construction. It was conceded by the parties that the rule to be applied was precisely the same as it would have been had the insurance been upon the building which had been set on fire by the rioters.

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* Copies of the "summing up" of the Justice in the case cited including the instruction to the jury will be given to the counsel for the respondent and also placed with the clerk of the Court for delivery to the several judges of the Court in connection with this brief.

We respectfully suggest to the Court that the statement in its opinion in *Connor* vs. *Manchester Ins. Co.,* 130 Fed. 745, that the fire therein referred to "indirectly" caused the loss was inadvertent. The fire was started by order of the Supervisors at a point remote from the plaintiff's land, and without any new intervening cause continued to spread until it had consumed his grain field. The Court says in its opinion: "There was but one fire." At its inception the fire was "directly" applied to the herbage, which it consumed, and it seems to us that it would be difficult to fix the point in its progress at which it ceased to be the direct and became the indirect cause of the plaintiff's loss. For the same reason we submit that Judge Whitson was in error in stating that if a fire should be started by an earthquake in a building and be thence communicated from building to building until it reached property a mile away, the fire in the building thus reached would be indirectly and not directly caused by the earthquake.

Great stress is placed by respondent upon the fact that the Court in the Scheffer case said of the Tweed case: "This case went to the verge of sound doctrine in holding the exception to be the proximate cause of the loss of the Alabama warehouse," but he does not question the correctness of the principle upon which that "sound doctrine" rests which was given immediately after this statement, and upon which the Court held that the Tweed case was cor-

rectly decided, viz.: *"That no other proximate cause was shown."* It is under this rule, viz., that no other cause for the fire was shown, that we contend that the earthquake was the proximate cause of the plaintiff's loss and therefore within the exemption clause of the policy. In *"The G. R. Booth,"* 171 U. S. 450, where the rule given in the Tweed case was approved there will be found a clear statement of the law in regard to proximate cause. If upon the fact that where there were three warehouses intervening between the building in which the fire was started and that in which was the insured cotton was burned, the Court was of the opinion that the case was "within" the verge of the "sound doctrine," which it gives can it be held as matter of law that it would be going "beyond the verge" of that sound doctrine to hold that the earthquake was the proximate cause of the loss of the plaintiff's goods situate in a different block from that where the fire was started by it "when no other proximate cause is shown?"

Whether the destruction of the plaintiffs' property is caused by a fire kindled on his land by sparks from a locomotive or by a fire kindled on land adjoining his by sparks from the same source does not affect the liability of the railroad company.

Butcher vs. *Vaca Valley R. R. Co.,* 5 Pac. Rep. 359.

Clark vs. *S. F. Railway Co.,* 142 Cal. 613.

Atchison, etc. R. R. Co. vs. *Stanford,* 12 Kan. 376-380.

Northern Pac. R. R. vs. *Lewis,* 51 Fed. 568.

The contrary rule referred to by respondent is limited to the States of Pennsylvania and New York and has been elsewhere repudiated, especially by the Supreme Court of the United States in *Grand Trunk Railway Co.* vs. *Richardson,* 91 U. S. 454 and by this Court in *Connor* vs. *Manchester Ins. Co.,* 130 Fed. Rep. 743.

Respondent says (p. 39) "A cause which has ceased to operate before the loss occurs is not the proximate cause of such loss;" and also quotes from the opinion in the Boon case the statement that "the attack as a cause never ceased to operate until the loss was complete," and argues that as the earthquake had ceased to vibrate before the fire had reached plaintiff's goods it cannot be held to be the proximate cause of the loss. The statement in the Boon case was not made by the Court as a ground for its decision, but its decision was based upon the ground that the attack was the proximate cause of the loss, inasmuch as it set in operation every agency, including fire, that contributed to the destruction of the property.

The explosion in the Tweed case had ceased to operate before the fire had reached the Alabama Warehouse, where the plaintiff's loss occurred. The collision in the Express Company case, 95 U. S. 227, had ceased before the fire had reached the merchandise that was destroyed. The explosion and the collision were held to be the proximate causes of the loss, and had they not been exempted in the

policies would have rendered the insurer liable. In *Phillips on Insurance,* Sec. 1132 (quoted in Mr. Bowie's brief) it is stated: "In case of the concurrence of different causes to one of which it is necessary to attribute the loss, it is to be attributed to the efficient predominating peril, *whether or not it is in activity at the consummation of the disaster,*" giving as authority therefor

Dole vs. *Ins. Co.,* 2 *Cliff.* 431.

V.

Under the provision of Sec. 2628 of the Civil Code of this State the defendant is not liable to the plaintiff upon the policy sued upon.

That section is as follows:

"Excepted Perils. When a peril is specially excepted in a contract of insurance, a loss, which would not have occured but for such peril, is thereby excepted; although the immediate cause of the loss was a peril which was not excepted."

Substituting the facts set forth in the answer and given to the Court in the opening statement at the trial the section would read as follows:

"When in a contract of insurance loss or damage occasioned by or through earthquake is excepted, a loss, which would not have occurred but for the earthquake, is thereby excepted; although the immediate cause of the loss was fire which was not excepted."

Section 2626 of the Civil Code defines the liability of an insurer against a peril when the policy makes no exception to a loss from that peril. It declares that he is liable whenever that peril was the "proximate" cause of the loss but is not liable when that peril is only the "remote" cause of the loss.

Section 2628 defines his liability when a peril is specially excepted in a policy and declares that although the peril insured against was the "immediate" cause of the loss he is not liable if that loss would not have occurred but for the excepted peril. The expression "but for" is a causal connective between the words preceding it and those following it—between the loss and the excepted peril—and is equivalent in meaning to "except in consequence of" or "except by reason of."

The two sections of the Code are in no respect inconsistent or inharmonious. The Legislature was making provision for two different kinds of policy and it was more natural to express the rule applicable to each kind in a separate section than it would have been to place in either an exception from the provision of the other.

In *Strong* vs. *Sun Mutual Ins. Co.,* 31 N. Y. 105, where by the terms of the policy the insurer was "not liable *for* any loss arising from the bursting of boilers," the Court held that the word "for" meant "by reason of" or "on account of," and that the policy should be construed to exempt the

insurer from "any loss arising by reason of or on account of the bursting of boilers."

The phrase "which would not have occurred but for such peril" has a broader meaning and a wider operation than a mere declaration that the insurer should not be liable for a loss *caused* by the excepted peril. It is a declaration that he shall not be liable for a loss that may be incurred by reason of or on account of the excepted peril; and as the section places no restriction or limitation upon the character of the relation of the excepted peril to the loss or of its connection therewith, its provisions are applicable whether the loss results directly or indirectly from the action of the peril and although the peril is only the remote cause of the loss. The concluding phrase of this section *"even though the immediate cause of the loss* was a peril which was not excepted," clearly indicates that the section is intended to provide for a case in which the excepted peril is only the *remote* cause of the loss.

"Immediate" as thus used in Sec. 2628 is placed in contrast with "remote" while in Section 2626, "remote" is placed in contrast with "proximate." Under Sec. 2626, fire need not be the "immediate" cause of the loss to render the insurer liable, as we have pointed out in Subdivision III of this brief, but whether immediate or not if it is the "proximate" cause the insurer is liable.

The "immediate" cause, however, can never be the "remote" cause. It may be a link in the chain

between the proximate cause and the result, or between the remote cause and the result, but it is never itself the "remote" cause. As used in Sec. 2628, the "immediate cause" is to be construed as meaning the cause nearest in time. The excepted peril may, however, be the remote cause by which the immediate cause is brought into action or made an instrument in effecting the loss, and if so the insurer's liability for the loss is excepted from the policy. If, therefore, the earthquake be regarded as merely the "remote" cause of the fire, inasmuch as it was an excepted peril, the defendant is not liable for the loss of which the fire was the "immediate" cause.

The contention of respondent that the "but for" peril referred to in this section is the "proximate" cause of the loss would render the section superfluous, for in that case a loss of which the excepted peril was the "proximate" cause would not be a loss "by a peril insured against," and under section 2626, there would be no basis for a liability of the insurer. In the present case, for example, the insurance is against loss by fire except where such fire is caused by earthquake. Hence a fire, which earthquake is the "proximate" cause is not a peril insured against.

Respondent states in his brief (page 58) that "the insurer is not liable even if the peril insured against is the immediate cause of the loss, provided the efficient and proximate cause is a peril which is specially excepted"; and also (page 48),

"where the peril insured against is the effect of a dominant operating cause *controlling* it and such cause is expected the insurer is not liable." If, therefore, as we have contended herein and in our former brief the earthquake of April 18th, 1906, was the proximate cause of the loss which destroyed the plaintiff's property, and as all loss occasioned by or through earthquake is within the excepted peril, it must follow that under section 2628 the defendant is not liable for the loss.

The respondent, however, having contended that the earthquake was not the proximate cause of the loss, in connection with that argument contends (page 60) that the "but for" cause referred to in section 2628 "is not a remote cause or factor but the efficient cause or the cause in opposition to the immediate instrument of the efficient cause." The closing words of this sentence are inconsistent with the position elsewhere taken by him. Under section 2628 if the loss occurred by reason of an excepted peril the immediate cause of the loss, if it is a peril not excepted, is an irrelevant element in determining the liability of the insurer. If, however, the excepted peril is the efficient, i. e., the proximate cause of the loss, and, as conceded by respondent, exempts the insurer from liability, the fact that the peril not excepted is the "immediate" *instrument* of the efficient cause, i. e.—of the excepted peril—would be an equally irrelevant element. If the earthquake was the efficient or proximate cause of the fire and the fire was only an in-

strument by means of which the loss occurred, the loss is within the excepted peril.

We do not understand in what manner it can be claimed that section 3268 of the Civil Code has any application or how the provision of section 2628 is in any respect qualified by it. Section 2628 expressly exempts the insurer from liability for a loss which may occur by an excepted peril; and the parties to the policy herein have expressly named certain perils, including earthquake, as exempting the defendant from liability. Whether it is "inconceivable" that any intelligent person should exempt such perils or that "in the very nature of things," the parties did not intend to so stipulate, the fact remains that by the terms of their contract they have agreed that the defendant should not be liable for a loss which occurred by reason of this excepted peril.

That portion of Mr. Bowie's brief (p. 66 et seq.) in reference to section 2628 C. C., in which he endeavors to show that the earthquake clause is merely a proviso and not excepted peril, is based upon his other contention that the "loss or damage" to which the exemption refers is not the "direct loss by fire" against which the insurance is made. This appears from his words (p. 71): "The policy of insurance in the case at bar insures against the peril of fire alone. The peril of earthquake not being a peril covered by any words of the contract, cannot be a

peril excepted from the contract. That which has never been included cannot be excepted."

As we have already shown that the term "loss," as here used, is to be construed as meaning the "direct loss by fire" named in the contracting part of the policy, the basis of his contention disappears.

He contends, moreover, that the effect of the section is limited to perils "*designated* as excepted *in the insuring clause*" of the policy. The section itself makes no such requirement nor are policies which insure only against a single peril excluded from its provisions. Whether one or more perils are covered by the policy, if it provides that its terms and conditions shall not embrace certain other perils or that the insurer shall not be liable for any loss by reason of other designated perils it is within the provisions of the section.

His further contention that the exemption clause is only a proviso and is not an exception, as well as the case of *Western Ins. Co.* vs. *Mohlman,* 83 Fed. 811, cited by him in support thereof, might be relevant or material if we were seeking to determine where the burden of proof rests. Whatever may be the rule as to the question of pleading or introducing evidence, that question is not involved here, as the ruling of the Circuit Court was made before there was opportunity to offer any evidence. The defendant, however, has always conceded that the burden of proof of the existence of the facts showing the exemption rested upon it.

VI.

Much space is given in the briefs filed in support of the judgment in discussing the effect of clauses of exemption entirely unconnected with the question before the Court, such as loss by theft or by negligence of the assured, damage by lightning, etc., the only effect of which is to withdraw attention from the question involved in the case. In the case before the Court, these are mere moot questions and we do not deem it necessary to occupy the time of the Court in discussing them.

Counsel for respondent has devoted one of his points to a discussion of the defense based upon the failure of the water supply, but as that defense was not the basis of the order of the Court directing a verdict for the defendant and as no action of the Court thereon is assigned as error we have not deemed it relevant to make any reply to that portion of his brief.

Neither have we deemed it relevant to discuss other questions broached in his brief, viz.: whether there is any connection between volcanoes and earthquakes; whether an earthquake is caused by subterranean fires or is produced by the slipping of the earth's crust resulting from the attraction of the moon. We have never heard it suggested, and it is not suggested in the record herein, that the earthquake of April 18th, 1906, was in any respect connected with or caused by subterranean fires. We, however, call attention to

the fact that in the Enc. Brit. under the subject "Earthquake" it is stated that there is no relation of cause and effect between volcanoes and earthquake.

The picture of the ship near Vesuvius during an eruption, violently tossed upon the waves by an earthquake, which is presented in the quotation from the opinion in the Everett case, fades away when the actual language of the Judge, viz.: "receiving damage from substances projected therefrom" is substituted for the words "violently shaken by an eruption" as given in the quotation. It does not appear that in that case fire had anything to do with the damage. The Court placed its decision upon the ground that the damage was caused by concussion and not by fire; and in his statement of the case the reporter says that the gun powder ignited and exploded, "but from what cause is unknown." In the language of insurance policies the explosion of gun powder from ignition is not fire.

Frequent mention is also made in his brief of policies issued by other companies and of other policies issued by this company which contain provisions differing from those contained in the policy before the Court. But as none of these other policies were before the trial Court and the provisions therein are authenticated only by the statement in the brief and form no part of the record, and as the judgment under review was based solely upon the policy which

is set forth in the record, we deem it irrelevant to discuss what would be the extent either of the liability or of the exemption of an insurer under policies containing those provisions. The conditions and provisions of policies of insurance, as in the case of other contracts, vary greatly according to the situation and character of the property insured and the disposition of the contracting parties. The decisions of Courts have therefore been limited to the construction of the varying provisions before them; and unless the provisions in a policy are the same as those which were before the Court in the case cited, the opinion of that Court is valuable only as the principle decided by it is applicable to the provision under consideration.

"Each case must be determined upon its own facts and as no two policies are exactly alike so there is little assistance to be derived from the authority of decided cases."

Heffron vs. *Kittanning Ins. Co.,* 132 Penn. 580.

The provision in the policy herein for liability for direct damage by lightning other than from fire, by its terms provides for an additional agreement before it can become effective, while the liability for loss by fire ensuing from lightning is distinct and unlimited. The lightning clause in its varied forms in different policies dates back to the case of *Spensley* vs. *Insurance Co.*, 55 Wis. 543, in which property insured against

loss or damage by lightning was destroyed by a tornado, and the Court held that under the evidence before it of electric manifestation during the tornado it was a question of fact for the jury to determine whether the tornado was not a species of lightning or at least caused by lightning; but as the lightning clause is not involved in this case the decisions thereon have no bearing upon the question now before the Court.

We are unable to see what bearing the Warmcastle case, 201 Penn. 302, or the Beakes case, 143 N. Y. 402, have upon the issue herein. All that was decided in either of these cases is that where the loss is the result of two concurrent causes and the property was insured against loss by only one of the causes, a recovery can be had only for the loss sustained from the peril insured against and that the burden of segregating that loss from the other is upon the plaintiff. In each of the policies in those cases, and also in the policy in the Bergin case, the property was insured against loss by lightning. In neither of them was any other peril coupled with lightning; but by way of definition of the word "lightning" the policy expressly declared that it did not include cyclones, tornadoes, etc.

The opinion in the Boon case, reported in 40 Conn., from which counsel makes the quotation upon page 40 of his brief and to which Mr. Bowie refers on p. 53 of his brief, is the opinion of the

Circuit Court whose judgment was reversed by the Supreme Court in 95 U. S. 117.

The Wassau Telephone Case, 101 N. W. 1100, was decided upon the ground that the policy before the Court was a standard policy and that as the statute prescribing its form forbade placing therein any additional conditions the exception covering an electric current was void. The portion of the opinion giving this as the ground for the decision is omitted in the brief of Mr. Bowie. The statement quoted from the concluding portion of the opinion, of what the Court might hold upon a state of facts which was not then before it was not a judicial determination upon those facts and is not entitled to any consideration as an authority.

We respectfully ask that the judgment of the Circuit Court be reversed.

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